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No. 854

IN THE

SUPREME COURT

OF THE

United States

October Term 1957

VICTOR L. de CASAUS,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI

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PETITION FOR WRIT OF CERTIORARI

To The Honorable Earl Warren, Chief Justice and to the Honorable Associate Justices of the Supreme Court of the United States:

Your petitioner, VICTOR L. de CASAUS, respectfully petitions for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit, seeking to reverse a judgment of that Court affirming petitioner's conviction of a single count, to-wit: Count Four of an indictment charging him with making a false statement, knowing it to be false, for the purpose of influencing the action of the Commodity Credit Corporation in violation of Section 714(m), Title 15, U. S. Codes.

JURISDICTION

Jurisdiction is conferred by Title 28, Section 1254 (1), U. S. Codes, and Rules 19, 21, 22, 23, Rules of the Supreme Court of the United States.

The judgment of the United States Court of Appeals for the Ninth Circuit was rendered on November 22, 1957, and Petition for Rehearing was duly filed, considered and denied January 14, 1958. Time for filing the Petition for Writ of Certiorari was duly extended by the Honorable Earl Warren, Chief Justice, to March 15, 1958.

OPINION BELOW

The Opinion is printed as an appendix to this petition.

STATUTES INVOLVED

Title 15, Section 714(m), U. S. Codes.

(A) "Whoever makes any statement knowing it to be false, or whoever wilfully over influences any security corporation for the purpose of influencing in any way the action of the corporation, or for the purpose of obtaining for himself or another, money, property, or anything of value, under Section 714-714(o) of this title, or any other act applicable to the corporation, shall upon conviction thereof, be punished by a fine of not more than $10,000 or by imprisonment of not more than five years, or both."

Fifth Amendment to the Constitution of the United States.

The relevant portion of the Fifth Amendment to the Constitution of the United States reads as follows:

> ". . . nor shall any person . . . be deprived of life, liberty or property without due process of law."

Rule 7, Federal Rules of Procedure for the District Courts of the United States.

STATEMENT OF THE CASE

The appellant was the Manager of a firm known as Casaus, Inc. It was in the business of exporting commodities, particularly into Mexico. During the course of its business, the firm had purchased considerable quantities of lima beans from the Commodity Credit Corporation, from its surplus, to ship into Mexico.

Some time in 1954, Doyle Kennedy, a special agent of the Agriculture Department of the United States, commenced an investigation to see if all of the lima beans sold to Casaus, Inc. had reached Mexico, or whether some of them had been sold on the domestic market. For this purpose he went to the office of Casaus, Inc. in Los Angeles and examined the books and records for the purpose of making an audit and checking up on the shipments from time to time. He talked to the petitioner and other employees of Casaus,

Inc. in the gathering of his information. The answers of the petitioner, as well as other employees, were general. From time to time he endeavored to get some statement in writing for the petition, but did not do so. Kennedy himself prepared such a statement.

In the course of their business, Casaus, Inc. would send their products to a shipper who in turn would make out export declarations for the United States Customs Office at Calexico, California. When the beans would reach Mexico, there would be another import declaration, which were generally called "landing receipts" from the Mexican Government.

The investigation of Doyle Kennedy, who was not an employee of the Commodity Credit Corporation but of the Agriculture Department, covered various dates and times and apparently had been concluded some time in November of 1954, with nothing further happening and apparently the investigation appeared closed until the petitioner was involved in an automobile traffic accident which brought him into the newspaper limelight. Thereafter and while he was in the hospital following this traffic accident on the Los Angeles freeway, Doyle Kennedy himself went to the hospital and caused the petitioner to be arrested on the instant charges. This was followed with the usual additional publicity, pictures, etc.

The petitioner was merely an employee on a salary of Casaus, Inc. The indictment was immediately returned charging petitioner as follows, in Count Four:

"On or about November 1, 1954, at Los Angeles, California, within the Southern District of California, Central Division, Victor L. de Casaus, did make a statement, knowing it to be false, for the purpose of influencing the action of Commodity Credit Corporation, an agency of the United States Department of Agriculture, and for the purpose of obtaining for himself money and property and other things of value, in that he did then and there state to an officer of the United States Department of Agriculture, namely, Special Agent Doyle S. Kennedy, that as of October 6, 1954, Casaus, Inc. had exported to the Republic of Mexico 15,424-cwt. of Lima Beans which Casaus had purchased from the Commodity Credit Corporation, when in truth and in fact as defendant then and there well knew, a much lesser quantity of such beans had actually been exported to the Republic of Mexico by Casaus, Inc.

A Motion for a Bill of Particulars, seeking to determine the alleged quantity of such "much lesser quantity" of such beans, was denied by the District Court. Also, a Motion to Dismiss for failure to state an offense against the laws of the United States was denied as to this count, and the defendant was placed upon trial thereon.

During the course of the trial, the Government produced as a witness WILLIE FAWVER (R. Vol. 2, pp. 376-382, 393, 394). Fawver testified that he was a Deputy Collector for the U. S. Customs Service lo-

cated at Calexico, California. That at the request of the Government, he conducted an examination of the United States Customs files of Shipper Export Declaration Form 7525V for 1954, making a search for certain dates for shipments of lima beans and other beans (R. 380-381). He was looking for the name of ALMA CENES in Mexicali, as the consignee. On cross-examination, he testified that the Customs House Brokers were the ones who make up the export declarations but they are usually presented by the people doing the exporting. "The declarations are confidential." (R. 399-400). "No one can get a certified copy of them." (R. 400). Mr. Kennedy furnished the dates of the exports and the list that he furnished showed the dates with the number of bags that were supposed to be shipped and the date of exportation. These dates were dates that related to "landing receipts" which came from Mexico and which the Government asserted were not substantiated by the export records of the United States. The defense asked leave of court to have the Government produce its records so that it could examine the records itself, under a number of names of shippers who did business with Casaus, Inc. Although it was claimed that the records were quite voluminous, Mr. Fawver produced them in the back of his automobile and the examination could not have taken more than two or three hours. The Government asserted the privilege that the documents were confidential, and the court sustained the objection and

declined to let the petitioner examine the same. They were vital to the defense.

While the appeal was pending, the decision of the United States in *Jencks v. United States*, 353 U.S. 657, was returned by the Supreme Court and appellants ground their appeal on the refusal of the government to allow appellant's counsel to examine the export documents. The Circuit Court of Appeals held that no more was required of the Government than the right to cross examine the custodial agents produced by the Government as witnesses, and that the Rules of Criminal Procedure (Rule 27) did not require the Government to permit examination of the original documents.

The appellant also attacked the indictment as insufficient and moved the trial court for a Bill of Particulars specifying the amount and quantity of beans which it is alleged had been shipped into Mexico. The Motion to Dismiss was denied and request for Bill of Particulars was denied.

Petitioner also, in the course of the trial, sought to take depositions before a judge or court of law in Mexico in accordance with the United States Code Provisions permitting the taking of depositions in foreign lands. The request for taking depositions came as a result of an attack made by the Government on eleven certified copies of landing receipts in Mexico, which landing receipts were certified to by officials in Mexico as being a true and correct copy of

imports of beans into Mexico from Casaus, Inc., to a Mexican importing firm named ALMA CENES DISTRIBUDORES MERCANTILES. The Government had produced a Mexican employee of its Customs Office who testified that he could not find comparative documents in his files. The petitioner then sought to produce by depositions in Mexico the officials who filed the documents. The trial court denied his motion to take the deposition in Mexico and continued the trial without defendant having the benefit of this testimony.

The sole witness who testified as to the purported false allegation or statement was the investigator NOT directly employed by the Commodity Credit Corporation. No other witness testified.

After the case was submitted to the jury, two volumes of invoices which the court had declined to admit into evidence, found their way into the jury room. The defendant made a Motion for a New Trial, grounded among other grounds upon receipt of this unauthorized receipt of documents. The motion was denied.

SPECIFICATIONS OF ERRORS

1. Whether a statement alleged in the indictment to be "as of October 6, 1954 Casaus, Inc. had exported to the Republic of Mexico 15,524-cwt. of lima beans which Casaus had purchased from Commodity Credit Corporation, when in truth and in fact defendant then and there well knew a much lesser quantity of such beans had actually been exported to the Republic of Mexico by Casaus, Inc.," is supported by evidence that no such exact statement was made to Doyle S. Kennedy, a Special Agent of the Agriculture Department; but that as of November 1, 1954 (a different date) he met appellant and was shown a paper wherein appellant had stated that Casaus, Inc. had received 15,714.20-cwt. of beans from Commodity Credit Corporation and that appellant then said in the course of conversation with Kennedy that all of these *beans* (not limas) have been exported *at this time.*

2. Whether a statement alleged to relate to October 6, 1954 is supported sufficiently by evidence related to November 1, 1954, and whether the alleged statement charged in the indictment related to lima beans and to exports into Mexico whereas the testimony of Kennedy only related to exporting and did not relate to lima beans and did not relate to Mexico.

3. Whether there is any proof whatsoever that the purported statement was supported by any evidence that it was made; that it was made for the purpose of obtaining for himself money, and property, and other

things of value, or whether it was made for the purpose of influencing the action of the Commodity Credit Corporation.

4. Whether the statute regarding false statements can be supported by a single witness, and whether the decision of the Ninth Circuit is in conflict with the decisions of the District Court of other Circuits, and whether it is necessary therefore to grant a hearing to establish uniformity of opinion.

5. Whether the court erred in refusing to let the appellant examine the records in the office of the United States Customs for the purpose of defending himself at the trial, and whether the decision is in conflict with *Jencks v. United States*, 353 U.S. 657.

6. Whether the court erred in declining to let the appellant take depositions in Mexico in the course of the trial under the provisions of Title 28 Section 1781, U. S Code.

7. Whether the Commodity Credit Corporation is such an agency of the United States as to make it an offense to make any statements to officers of the Agriculture Department in reference to matters concerning the Commodity Credit Corporation.

8. Whether this case is governed by the law of *United States v. McNinch* now before this court on the status of the Commodity Credit Corporation.

9. Whether the court erred in refusing a new trial when the jury received evidence out of court.

QUESTIONS PRESENTED

I.

The case involves important questions of Criminal Law which have not been, but should be decided by this Honorable Court; namely, whether a charge of making a false statement relating to one date and not testified to by the government witness is established by inference and deduction relating to conversation on another date, and whether a charge made of making a false statement for the *purpose of influencing a government corporation* and for the purpose of obtaining money, and property and other things of value is established by a total lack of such proof.

II.

Whether there is a congressional intent to prosecute a person for making statements allegedly false during the course of an investigation by government investigating officers.

III.

Whether such a charge is established by testimony of a single witness to the conversation, or whether two witnesses are required similar to that in perjury. This question was left undecided in *Ben Gold v. U. S.*

IV.

Whether the statement involved is one required by Rule or Regulation to be made, or whether it refers to

any statement regardless of whether it is required by any Rule or Regulation to be made.

V.

Whether the decision of the District Court in refusing to allow appellant to inspect the government records of the United States Customs Office requires the dismissal of the case under the authority of *Jencks v. United States,* 353 U.S. 657.

VI.

Whether the court erred in refusing to allow appellant to take depositions in Mexico.

VII.

Whether the court erred in refusing a Motion for New Trial when matters outside of evidence reached the jury room.

REASONS FOR GRANTING THE WRIT

This Court should grant the Writ to decide important questions of Criminal Law which have not been, but should be determined by this Honorable Court; namely, whether the false statement statute requires proof of the specific statement that was made and cannot rest upon inference or conjecture from some other statement.

Originally a similar statute was interpreted by former Chief Justice Hughes in *United States v. Gilliland,* 312 U.S. 86, in which Section 1001 of Title 18 was under consideration. It was there indicated that the false statement should be one required by Rule or Regulation to be made and not one that might be incidentally made. There the court, upholding the constitutionality of the statute, pointed to its history wherein theretofore a written claim had to be filed and it was generally known as a False Claim Statute. Two district courts in other districts have held that the statement referred to in the statute was not one that was being made to an investigating officer and that Congress did not intend such statements to constitute a violation of the statute. It was pointed out that in the various statutes of various departments provisions are made for punishment for perjury, which necessarily require that the statements referred to be made under oath. This would be unnecessary if the False Claim Statute was interpreted as the Circuit Court of Appeals for the Ninth Circuit has interpreted it.

See: *United States v. Levin,* 133 Fed. Supp. 88.

We do not think that the statute regarding false statements was meant to apply to comments and discussions with investigators, clerks, FBI agents and the persons in that category in the course of investigations.

United States v. Levin, 133 Fed. Supp. 88.

In *People v. Levin,* 133 F. Supp. 88, the court said:

"[1] If the statute is to be construed as contended for here by the United States, the result would be far-reaching. The age-old conception of the crime of perjury would be gone. 18 U.S.C.A. §1621. Any person who failed to tell the truth to the myriad of government investigators and representatives about any matter, regardless of how trivial, whether civil or criminal, which was within the jurisdiction of a department or agency of the United States, would be guilty of a crime punishable with greater severity than that of perjury. In this case the defendant could be acquitted of the substantive charge against him and still be convicted of failing to tell the truth in an investigation growing out of that charge, even though he was not under oath. An inquiry might be made of any citizen concerning criminal cases of a minor nature, or even of civil matters of little consequence, and if he wilfully falsified his statements, it would be a violation of this statute. It is inconceivable that Congress had any such intent when this portion of the statute was enacted. A literal construction of a statute is not to be resorted to when it would bring about absurd consequences, or flagrant injustices, or produce results not intended by Congress. *Sorrells v. United States,* 287 U.S. 435, 446, 53 S. Ct. 210, 77 L. Ed. 413. The lack of this intention is clearly illustrated from the fact that numerous statutes have been passed which authorize agents of different departments and agencies of the United States to administer oaths to those from whom they are seeking in-

formation. 5 U.S.C.A. §93 authorizes an officer or clerk of any of the departments lawfully detailed to investigate frauds on, or attempts to defraud the government or any irregularity or misconduct of any officer or agent of the United States to administer an oath to any witness called to give testimony. This authority was extended in 5 U.S.C.A. §93a. Special authority to administer oaths in the course of an investigation is given in the following statutes:

"5 U.S.C.A. §521 (Officers of Department of Agriculture who are designated by the Secretary); 5 U.S.C.A. §498 (Investigators with the Department of Interior; 7 U.S.C.A. §420 (Secretary of Agriculture or any representative authorized by him in the administration of the Cotton Futures Act, Grain Standards Act, Warehouse Act, and Standard Containers Act); 8 U.S.C. §152, now 8 U.S.C.A. §§1225(a), 1357(b) (Immigration inspectors with respect to aliens); 12 U.S.C.A. §481 (Federal Bank Examiners in examination of federal banks or affiliates thereof); 18 U.S.C.A. §4004 (Wardens, superintendents, and associates wardens of Federal Penal Institutions); 19 U.S.C.A. §1486 (Customs officer, chief assistants or any employee of the Bureau of Customs designated by the Secretary of the Treasury, or in their absence, postmasters or assistant postmasters in matters involving less than $100); 26 U.S.C.A. §§3632(a) and 3654(a) (Collector, Deputy Collector of Internal Revenue, and agents and officers making investigations); 42 U.S.C.A. §272 (Medical Quarantine Officers of United States)."

The case also raises an important question left undecided in *Gold v. United States,* 1 L. Ed. 2d 360, whether the statement requires the proof of two witnesses as in perjury. A rule which has not been followed by the United States Court of Appeals for the Ninth Circuit.

See: *Todorow v. United States,* 173 Fed. 2d 439.

There is also an important question of law as to whether the decision of this Court in the *Jencks* case, 353 U.S. 657, is equally applicable to the instant case where the Government relied on documents in its possession to endeavor to prove that appellant made a false statement but did not let the defendant examine the same.

The case also involves the right of appellant to take depositions in Mexico, only a few hours away from Los Angeles, and requiring not more than one day's continuance at the most, in order to get evidence rebutting government's evidence first produced at the trial.

The questions involved in this case also concern for the first time the interpretation of Title 15, Section 714(m), and whether the evidence was sufficient to support the verdict where there was no proof in the record that the appellant made the statement as charged and the government's case necessarily rested on the inference from some other statement made at some other time, and where the charge concerned "lima

beans" and the proof referred to all kinds of beans, and where the appellant was merely an employee of a concern and there was no evidence that any statement he made was for the purpose of influencing the action of the Commodity Credit Corporation, and for the purpose of obtaining for himself money, and property and other things of value, the statements being merely made to an agent of the Agricultural Department during the course of his checking up on previous sales of lima beans to the corporation employing the appellant.

The case also involves another important question of Criminal Law as to whether the court should have granted a Motion for a New Trial when it was shown that the jury received exhibits in the jury room which had not been admitted into evidence.

For each of these reasons we respectfully pray that Certiorari be granted and the judgment below reversed.

Respectfully submitted,

MORRIS LAVINE
Attorney for Petitioner.

APPENDIX

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

VICTOR L. DE CASAUS,	)	
Appellant,	)	No. 15,389
vs.	)	Nov. 22,
UNITED STATES OF AMERICA,	)	1957
Appellee.	)	

Appeal from the United States District Court for the Southern District of California, Central Division

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BEFORE: HEALY, POPE, and CHAMBERS, Circuit Judges

HEALY, Circuit Judge

Appellant was convicted by a jury of the offense of making a false statement to an investigating officer of the Commodity Credit Corporation (hereafter CCC) in violation of 15 USCA §714m.[1] He attacks his conviction

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[1] "§714m. Crimes and offenses—False statements; overvaluation of securities. (a) Whoever makes any statement knowing it to be false, or whoever willfully overvalues any security, for the purpose of influencing in any way the action of the Corporation, or for the purpose of obtaining for himself or another, money, property, or anything of value, under sections 714-714o of this title, or under any other Act applicable to the Corporation, shall, upon conviction thereof, be punished by a fine of not more than $10,000 or by imprisonment by not more than five years, or both.

. . ."

generally as being based on an insufficient indictment and as not being supported by the evidence. The indictment is set out in footnote 2 below.

The proof in the case for the government was that appellant, as general manager of the Casaus Company, had negotiated the purchase for export of some 15,000 cwt. of lima beans from the CCC for a price below the domestic market price. Failure so to export rendered the Company liable to the CCC for the difference between the price paid and the domestic market price. Investigation by CCC produced evidence (introduced at the trial) showing that a substantial amount of the beans purchased from the CCC were sold domestically, and that documents supplied by Casaus Company showing export of such beans were false. The government's chief witness was one Kennedy, a special agent of CCC. He testified that on November 1, 1954, during his investigation, he met with appellant and was shown a paper wherein appellant had stated that Casaus Company had received 15,417.20 cwt. of beans from the CCC. Kennedy testified, "Mr. Casaus said that all these beans had been exported at this time." He

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[2] "On or about November 1, 1954 at Los Angeles, California, within the Southern District of California, Central Division, Victor L. de Casaus did make a statement knowing it to be false, for the purpose of influencing the action of the Commodity Credit Corporation, an agency of the United States Department of Agriculture, and for the purpose of obtaining for himself money and property and other things of value, in that he did then and there state to an officer of the United States Department of Agriculture, namely, Special Agent Doyle S. Kennedy, that as of October 6, 1954 Casaus, Inc. had exported to the Republic of Mexico, 15,424-cwt. of lima beans which Casaus had purchased from the Commodity Credit Corporation, when in truth and in fact as defendant then and there well knew, a much lesser quantity of such beans had actually been exported to the Republic of Mexico by Casaus, Inc."

further deposed that appellant stated that he "had received all lima beans under all of the transactions with the CCC and that he had exported them all."

This evidence abundantly supported the indictment, and the latter in turn was clearly sufficient to support conviction under the statute. Compare *United States v. Debrow*, 346 U. S. 374, at page 376.

Appellant contends that a conviction cannot be supported by a single witness to the conversation. Such argument has been rejected in this circuit in non-perjury cases. *Todorow v. United States*, 173 F. 2d 439; *Fisher v. United States*, 231 F. 2d 99. And it hardly need be added that, even in perjury cases, one witness corroborated, as here, by circumstantial evidence is sufficient. *Weiler v. United States*, 323 U. S. 606.

Appellant asserts that the statute which he is charged with violating does not apply to statements made to investigating officers. Arguments to that effect have been universally rejected in cases involving like statutes. *United States v. Gilliland*, 312 U. S. 86; *Cohen v. United States*, 9 Cir., 201 F. 2d 386; *Marzani v. United States*, D. C. Cir., 168 F. 2d 133.

Finally appellant claims error in the trial court's refusal to allow him to search through voluminous government Customs records (some 50,000 in number). These records are kept secret by Department of Agriculture regulation in order to prevent unfair competi-

tion among shippers. On this point the issue below was whether certain export documents had been filed among these records. The nonexistence of such documents was testified to by two custodial agents, the thoroughness of their search being tested by cross-examination. This was far more than is required by Rule 44(b) of the Federal Rules of Civil Procedure, incorporated by reference in Rule 27 of the Federal Rules of Criminal Procedure.

Appellant asserts, however, that the court's refusal to allow the search was error in light of the recent decision in *Jencks v. United States*, 353 U. S. 657. We think the *Jencks* holding has no application to the situation before us. The record shows that the testimony of the two Customs agents, mentioned above, was material only as proof of counts 1 and 3 of the indictment. After the motion for inspection had been made the government voluntarily dismissed those two counts. The testimony of the government's witnesses therefore became immaterial to the prosecution's case, and appellant had no need for the aid of government documents further to test the accuracy of the testimony.

Affirmed.

POPE, Circuit Judge, concurring specially:

I think it is in order to say something about the specification of error based on the refusal of the court to require a production of customs office records for

defendant's inspection. Appellant's presentation of this point is most inadequate. Wholly apart from the language of our Rule 18 relating to the form and contents of briefs, it is fundamental that it is the duty of an appellant here to present an intelligible brief so that this court can learn therefrom what the party is talking about.

Here appellant argues about his motion, application or request to be permitted to examine or inspect records, but his brief contains not one single reference to any page of the ten-volume record, nor does it quote or state the substance of the asserted motion or application. By dint of a search, which no court should be required to make without the assistance of counsel, I find that midway of the trial appellant asked and was ordered to be allowed to inspect the export declarations covering the periods encompassing the dates of the claimed shipments specified in counts 1 and 3 of the indictment. Government witnesses had testified that in these periods there were no records of such shipments by appellant. Actually appellant did not inspect these records because counts 1 and 3, to which they related, were dismissed. No complaint can be made by appellant as to this.

Some 160 pages further along, and three days later, defendant asked for something else relating to counts

2 and 4, but the request as stated is, I think, wholly unintelligible. What was said is copied in the margin.[1]

The Government's proof had been that large quantities of surplus beans bought by appellant from Commodity Credit Corporation at reduced prices were sold by him on the domestic market, rather than exported as he represented. He had furnished the Corporation Mexican landing receipts which were proven to be false. A check of his truck, supposedly hauling lima beans to Mexico, showed that behind a thin layer of lima beans, which was supposed to be its whole load, were other products.

The most liberal interpretation that can be given to appellant's stated request is that he wanted to have for inspection all of the customs records of export declarations covering the period from March 1, to October 6, 1954. The evidence indicates that such export declarations numbered some 400 per day, which would make, for this 150 days, something like 60,000 documents which appellant was asking to be produced for his use and examination at this stage of the trial. The court offered to require production of any documents

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[1]Mr. Lavine: What I wanted, your Honor, in reference to Counts 2 and 4, which are the only counts left——

"The Court: What you want is with relation to what?

"Mr. Lavine: Count 2 was as to the records on file of exports by Casaus, Inc., from March 1, 1954, to and including June 10, showing exports by Casaus, Inc., Casaus Bros., New Mexico Bean Company, and those others, those names I gave you as to the quantity of exports which they had to the Republic of Mexico between March 1st and June 10th.

"The Court: Go ahead and finish your motion.

"Mr. Lavine: Then as to Count 4, in the same manner, the same proof of export in possession of the Government as to lima beans from March 1, 1954, to October 6, 1954, showing the record on file with the Government of the quantity of lima beans exported to the Republic of Mexico by those named."

of this character which defendant might specify as representing exports by him, but denied the blanket motion as "too broad and all-inclusive."

The facts of this case present no problem similar to that treated in the *Jencks* case, *(Jencks v. United States,* 353 U.S. 657). What appellant was seeking here were documents solely for discovery, not for use on cross-examination of any Government witness. An accused's rights of discovery, and the procedure to enforce the same, are stated in the Criminal Rules, (Rules 16 and 17). The extent and reach of those rights is discussed in *Bowman Dairy Co. v. United States,* 3451 U.S. 214. I think defendant's rights to demand inspection of the customs records here referred to would be subject to the same limitations as his rights to obtain documents, or to have discovery, under Rules 16 and 17.

As noted in the *Bowman Dairy* case, *supra,* the right to procure documents in possession of the Government under Rule 17 is subject to the trial court's power to quash or modify a subpoena therefor. Under Rule 17 (c) the trial court may take such action "if compliance would be unreasonable or oppressive." Here a demand, made midway of the trial, to inspect each of some 60,000 documents, which would involve suspension of the trial for that purpose, would appear to be a demand which the court in its discretion could properly find unreasonable. After all, appellant made no showing

to indicate that his proposed search was likely to turn up any specified documents.

I have noted above that the court ordered produced for inspection the records covering the limited periods involved in counts 1 and 3. These were brought into court. They filled seven boxes and weighed 400 pounds. Even these, the court thought "sounds like many thousands of documents to me—dealing with other people, other transactions of confidential nature." The demand for this larger, massive production resembles the demand for "a carload of personnel jackets" referred to in *United States v. Echeles,* 7 cir., 222 F. 2d 144, (cert. den. 350 U.S. 828).

There is also complaint about the refusal of the court to grant a motion, made by appellant in the midst of the trial, to take depositions in Mexico. There was no showing of any excuse for failure to comply with the rules relating to notice of taking depositions, or of any reason for such a belated request.

(Endorsed:) Opinion and Concurring Opinion. Filed Nov. 22, 1957.

Paul P. O'Brien, Clerk.

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In the Supreme Court of the United States

OCTOBER TERM, 1957

VICTOR L. DE GRAZIA, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE [illegible] IN OPPOSITION

[illegible],
Solicitor General,
[illegible],
Assistant Attorney General,
[illegible],
[illegible],
Department of Justice,
Washington 25, D. C.

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Statute and Rules:

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In the Supreme Court of the United States

OCTOBER TERM, 1957

No. 854

VICTOR L. DE CASAUS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the Court of Appeals (Pet. App. 1) is reported at 250 F. 2d 150.

JURISDICTION

The judgment of the Court of Appeals was entered on November 22, 1957, and a petition for rehearing was denied on January 14, 1958. On February 10, 1958, pursuant to an order by Mr. Chief Justice Warren, the time for filing a petition for a writ of certiorari was extended to and including March 15, 1958. The petition for a writ of certiorari was filed on March 13, 1958. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether a false statement to an investigator of the Commodity Credit Corporation constituted a violation of 15 U.S.C. 714m, which punishes false statements for the purpose of influencing action by the Corporation.

2. Whether the trial court erred in its rulings as to the inspection of customs records.

3. Whether there was error in the refusal of the trial court to order the taking of depositions in Mexico during the course of the trial on a matter which had been in issue since the return of the indictment.

4. Whether petitioner was prejudiced by the inadvertent delivery to the jury room of certain exhibits which had been offered in evidence by petitioner himself but which the court had excluded as irrelevant.

STATUTE AND RULES INVOLVED

15 U.S.C., section 714m, paragraph (a), provides:

> Whoever makes any statement knowing it to be false, or whoever willfully overvalues any security, for the purpose of influencing in any way the action of the Corporation, or for the purpose of obtaining for himself or another, money, property, or anything of value, under sections 714-714o of this title, or under any other Act applicable to the Corporation, shall, upon conviction thereof, be punished by a fine of not more than $10,000 or by imprisonment by not more than five years, or both.

Rule 27, F. R. Crim. P., provides:

> An official record or any entry therein or the lack of such a record or entry may be proved in the same manner as in civil actions.

Rule 44, F. R. Civ. P., paragraph (b), provides:

> A written statement signed by an officer having the custody of an official record or by his deputy that after diligent search no record or entry of a specified tenor is found to exist in the records of his office, accompanied by a certificate as above provided, is admissible as evidence that the records of his office contain no such record or entry.

Rule 15, F. R. Crim. P., paragraph (b), provides:

> The party at whose instance a deposition is to be taken shall give to every other party reasonable written notice of the time and place for taking the deposition. The notice shall state the name and address of each person to be examined. On motion of a party upon whom the notice is served, the court for cause shown may extend or shorten the time.

STATEMENT

Petitioner was convicted in the District Court for the Southern District of California, Central Division, under Count 4 of an indictment charging violation of 15 U.S.C. 714m(a) (IV, 749).[1] He was sentenced to a fine of $10,000 and imprisonment for one year, execution of the sentence of imprisonment being suspended and petitioner being placed on probation for a period of five years (IV, 799). His conviction was affirmed (Pet. App. 1).

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[1] References to the record are shown by a Roman numeral, indicating the volume, and an Arabic numeral, indicating the page, as there is no consecutive pagination throughout the record. The supplemental record filed by the Government under Supreme Court Rule 21-6 is referred to as "Supp. R."

The charge under Count 4[2] was that on or about November 1, 1954, petitioner knowingly made a false statement to Special Agent Doyle S. Kennedy, an officer of the Department of Agriculture, for the purpose of influencing the action of the Commodity Credit Corporation, an agency of said Department, and for the purpose of obtaining for himself money and property and other things of value. The statement alleged to be false was that, as of October 6, 1954, Casaus, Inc., had exported to Mexico 15,424 cwt. of lima beans, purchased by said company from the Commodity Credit Corporation, when petitioner well knew a much smaller quantity of such beans had been exported (I, 4).

1. The evidence showed that Casaus, Inc., was a family corporation of which petitioner was the general manager and the one who handled all the transactions here in question (Supp. R. 25-26). In such capacity, he purchased lima beans from the Commodity Credit Corporation (referred to as the C.C.C.) under an agreement that they would not be sold on the domestic market but would be exported and proof of exportation furnished. If the purchaser failed to export, he was to pay the domestic price therefor, rather than the reduced price at which they had been sold for the purpose of keeping them off the domestic market (XII, 101, 104-106; Exs. 1, 4;[3] Supp. R. 29-30).

Reports had been received by the Department of Agriculture that export lima beans were reaching the

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[2] Only Counts 2 and 4 were submitted to the jury, the other counts having been dismissed by the Government. The jury returned a verdict of not guilty on Count 2 and a verdict of guilty on Count 4.

[3] All exhibits referred to are Government exhibits.

domestic market, and Special Agent Kennedy was assigned to make an investigation (VI, 93). On November 1, 1954, petitioner stated to Kennedy that, during the period March 10 through June 18, 1954, his company had exported all of the lima beans the company had received under his agreement with the C.C.C.—in the amount of 15,417 bags (each bag a hundredweight) (V, 102, 104).

Although C.C.C. regulations, which were a part of the agreement and understood by petitioner, prohibited commingling export with domestic beans, petitioner had allowed this to be done (Supp. R. 29-30). The Government did not seek to enforce any penalty by reason of such violation, but did prove that, as a result of this commingling, the sum of domestic sales was so large as to make impossible exports in the amount claimed by petitioner. Following are the figures shown by the evidence:

Inventory 2/28/54.....	7,004 cwt. (Ex. 115A)		
Purchase from other than Government sources, 3/1/54 to 9/6/54.....	337 cwt. (Exs. 8, 9)		
Purchases from C.C.C. same period.....	15,417 cwt. (Ex. 124)		
Domestic Sales same period.....		13,656 cwt. (Exs.	1–23, 46–50)
Balance thus available for export.....		9,102 cwt.	
	22,758 cwt.	22,758 cwt.	

As a matter of mathematical calculation, petitioner's statement that he had exported 15,417 sacks could not have been true because, deducting the proved domestic sales from total stocks, there would be available for export only a balance of 9,102 sacks, some 6,315 sacks short of the number which petitioner claimed to have exported. In other words, at least 6,315 sacks of sur-

plus lima beans were necessarily sold on the domestic market.[4]

Domestic dealers testified as to their purchases during this period from the Casaus company of lima beans concealed as being pintos or white beans (II, 242-245, 276; III, 389, 292, 311-313, 319-320, 324-325, 332; IV, 557). Other deliveries of lima beans, similarly concealed, to domestic purchasers were testified to by truck drivers (III, 343, 355). A search of the company files revealed various false invoices covering up such transactions (V, 109, 115-128; VI, 8-9).

2. During the course of Kennedy's investigation, petitioner wrote him a letter in support of his previous statements that all C.C.C. lima beans had been exported and submitted in connection therewith photostatic copies of documents called "landing receipts", authenticated by a Mexican customs official and purporting to show that the beans in question had been imported into Mexico. With this was submitted the affidavit of petitioner's brother, an officer of both the consignor and consignee companies, that the alleged shipments of beans had been received in full (V, 89-93; Ex. 39).

Jose Jimenez, chief of the import section of the Mexican customs at Mexicali, testified for the Government at the direction of his superiors. He stated that he had compared the alleged photostatic copies of fourteen landing receipts, purporting to show exportation of lima beans to Mexico, and found that eleven of them had no original in the Mexican records, which, he

[4] The Government did not purport to have uncovered all the domestic sales, so the amount of diversion to the domestic market may have been, and probably was, greater.

stated, were complete for that year (II, 147-150). Two deputy collectors of customs from the United States side of the border testified that, if there had been any such exports, record thereof should appear in their office files of shipper's export declarations. A careful search had failed to reveal any such records (III, 361-365, 379-381).

A truck driver for the Casaus company testified to driving a load of beans to Mexico during this period at the direction of petitioner. The export declaration therefor, initialed by petitioner, called for 350 bags of dried large lima beans. The American customs officials, who knew that operations of the Casaus company were under investigation, required the unloading of the truck and found that the only lima beans in this load were placed in a layer of twenty bags at the back of the van truck. The balance of the load consisted of pinto beans and some empty sacks concealed by the layer of sacks filled with lima beans (III, 401-411, 415, 471-476).

The driver then obtained a new declaration from an export broker and made his delivery, together with an invoice in a sealed envelope. The customer opened it and it corresponded with the load that he had delivered (III, 412-413, 410). The driver thought that this was the only export declaration made out in the company office, the others being ordinarily prepared by their customs brokers (III, 415).

Following the testimony of the two United States customs officials that their records did not reveal the existence of export declarations covering the exports allegedly made, petitioner moved for the production of such records, which motion was sustained by the

court (III, 466-468). They were produced in seven boxes weighing approximately 400 pounds (IV, 567). However, it was explained to the court that the Bureau of Customs at Washington could not release export declarations of other companies for examination by their competitors without the written consent of the Secretary of Commerce (IV, 565-580).

At the court's suggestion, Counts 1 and 3 of the indictment, based on petitioner's allegedly false statement that these export declarations had been filed, were dismissed (IV, 621-622). However, the court held that petitioner was not entitled to any such sweeping discovery in connection with Counts 2 and 4. He stated that he would order the Government to produce any specific export declarations by the Casaus company, under any of its various trade names, and to any specific consignee, which petitioner might request, but would overrule the motion otherwise (IV, 577-578, 622, 626). Petitioner made no such requests.

3. After the testimony of Jiminez that eleven of the purported "landing receipts" had no counterpart in the official records of the appropriate office of the Mexican customs, petitioner asked leave to take depositions by interrogatory in Mexico to establish the official nature of the party making the certification and to prove that such certification was made in accordance with authorized practice (III, 436). The court ruled that there was no surprise and that the application was not timely, these matters having been in issue since the return of the indictment (III, 457-460).

ARGUMENT

1. Petitioner's false statement on which his conviction was based related to subject matter concerning

which he was under a legal obligation to give the Government truthful information. Under the Department of Agriculture regulations, which were embodied in petitioner's purchase agreement and which he understood, he was required, not only to export the commodities sold to him within sixty days of their purchase, but also to submit to the C.C.C. proof thereof within thirty days after each export shipment, which petitioner had failed to do (Supp. R. 29-30; Exs. 1, 4).

The question at issue in *United States* v. *Levin*, 133 F. Supp. 88 (D. Colo.), cited by petitioner—whether the general terms of 18 U.S.C. 1001 can be invoked to punish every false statement made to a Government investigator by a person under no obligation to give a statement in the first place—is not presented by this case. This prosecution is under 15 U.S.C. 714m, which requires that the false statement be made "for the purpose of influencing in any way the action of the Corporation" or for the purpose of obtaining a benefit under the Act. Here petitioner was under a duty to show that he had exported the beans. Under the terms of his agreement, it was a part of the consideration supporting the sale of the commodity at a greatly reduced price that the purchaser remove the surplus commodity from the domestic market and make due proof of his compliance. It was a proper inference by the jury that the purpose of such false statement was "to influence the action of the Corporation" in failing to demand that petitioner's company pay the domestic price for the lima beans, rather than the reduced price to get them off the domestic market, which additional payment would have been required had petitioner given a truthful statement on the subject. Such payment

would obviously have been quite substantial, as the purchases aggregated more than a million and a half pounds of beans.

Since, therefore, the evidence established a violation of the specific provisions of 15 U.S.C. 714m, the special rule of proof applicable to perjury cases does not pertain. *Todorow* v. *United States,* 173 F. 2d 439 (C.A. 9), certiorari denied, 337 U.S. 925; *Fisher* v. *United States,* 231 F. 2d 99 (C.A. 9). Actually, even under the test for perjury, the proof was more than ample; petitioner's conviction plainly does not rest "on the uncorroborated testimony of a single witness". *Weiler* v. *United States,* 323 U.S. 606, 608. While only one witness, Kennedy, testified directly to petitioner's making the statement in question that all C.C.C. beans had been exported, there were ample corroborating circumstances as to this, because petitioner maintained throughout the investigation that all such beans had been exported (V, 89-93) and again so asserted in his testimony during the trial (XI, 40). The falseness of the statement was established by the figures showing domestic sales from total available stocks, from the camouflaged shipment of a truck load of beans to Mexico, and from the customs records of both Mexico and the United States.

2. Under Rule 44 of the Federal Rules of Civil Procedure, made applicable to criminal proceedings by F. R. Crim. P., Rule 27, the non-existence of a record may be proved by the certificate of the officer having custody thereof, or his deputy, that he has made diligent search and found no such record to exist. The Government in this case went further and put on the stand two such deputies, who made oath that a search

had been made and who were subject to cross-examination.

The court properly refused to subject all of these voluminous confidential records to inspection. The court stated that it would compel the production of any particular export declarations named by petitioner in which his company was the consignor and for any specific consignee. If any such genuine export declarations had been in existence, there would obviously have been a record thereof in the files of the Casaus company, and they could have been requested explicitly, giving the dates and any other details which would facilitate their location. Petitioner made no such request. This case, therefore, bears no resemblance to *Jencks* v. *United States*, 353 U.S. 657, where this Court expressly reaffirmed the established principle that a demand for inspection must be limited to "specific documents" and must "not propose any broad or blind fishing expedition among documents possessed by the Government on the chance that something impeaching might turn up" (*id.*, p. 667).

3. The court acted properly, within its judicial discretion, in refusing to order the taking of depositions in Mexico during the trial to establish the authenticity of petitioner's eleven questioned "landing receipts". The genuineness of such documents had necessarily been in issue under the charges of the indictment, and the court properly ruled that the application was not timely and that there was no surprise. Cf. *Heflin* v. *United States*, 223 F. 2d 371, 375 (C.A. 5).

4. Petitioner's argument that matters outside the evidence reached the jury room is not supported by references to the record. We have been unable to find

anything in the record bearing on this point. What apparently occurred, according to the Government's brief on appeal to the Court of Appeals, was that during the jury's deliberations they asked for all the exhibits. By mistake, a number of invoices of the Casaus company, relating to other transactions, which had been offered by petitioner himself but excluded by the court as irrelevant, were delivered to the jury room. No suggestion is made as to how this may have prejudiced petitioner.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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